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[ORIGINAL CIVIL JURISDICTION]
McELWAINE, C.J.
March 18, 1938.

IN RE LOW KIM PONG'S TRUST SETTLEMENTS.

TAN GEOK BEE (w) AND ANOTHER v. SEK POH LEONG AND OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 135 of 1937]

Charitable Purposes—Temple Endowment.

A donor conveyed by deed to a Buddhist Priest about 12 acres of land in trust to erect or cause to be erected thereon by means of money to be collected by the Priest a temple for the perpetual worship of certain divinities. The Priest and his successors were empowered by the said deed to use such portion of the lands conveyed as may not be actually used in connection with the temple for the purpose of growing fruit trees or such other purposes as the Priest or his successors should think fit and to devote the proceeds thereof to such purposes as he or they may think fit. The Temple occupied roughly one quarter of the land conveyed to the Priest. A portion of the remaining land was compulsorily acquired by a local authority for the sum of $25.433.83. The plaintiffs who were the Administrators of the deceased donor's estate claimed the sum of $25,433.83 contending that the land given for fruit trees was not a charitable gift and that it was a gift in perpetuity and was void: alternatively the plaintiffs contended that the acquisition had caused a failure of the donor's intention and that it would be impossible to frame a cypres scheme to carry out this intention.

Held that the whole purpose of the deed was the establishment of a temple and its endowment and that the whole gift of the land including the land given for growing fruit trees was a good charitable gift.

Held further that the temple was beneficially entitled to the money and that the priest for the time being was entitled to the interest earned by the money.

ORIGINATING SUMMONS.

Adityan for the plaintiffs.

Zehnder for first and second defendants.

Howe, Crown Counsel for Attorney-General, the third defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

McELWAINE, C.J.—This originating Summons was taken out to determine who were entitled to the sum of $25,433.82, the net proceeds of a piece of land which had been compulsorily acquired.

By a deed dated 7th May 1900 Low Kim Pong after reciting that he was desirous of dedicating a piece of land for the purpose of a temple to be called Song Lim See for the worship of the Chinese god or goddess Sek Khia Jee Lai Hood and Kuan Sek in Poh Sat, and that it was intended that Sek Hean Whei (Bhuddist Priest) the party of the second part, should erect such a temple by means of money to be collected for that purpose, proceeded to convey to Sek Hean Whei (whom I shall hereafter refer to as the Priest) about 12 acres of land:

> "in trust to erect or cause to be erected upon the said land by means of money to be collected by him for that purpose a temple for the perpetual worship" of the divinities named in the recital.

Then followed conditions, the third being as follows:—

> "The said Sek Hean Whei or his successors as aforesaid shall have full power to use for the purpose of growing fruit trees or such other purpose as he or they may think fit such portion of the said land hereby conveyed as may not be actually used in connection with the said temple and to devote the proceeds thereof to such purposes as he or they may think fit.

Provided that nothing hereinbefore contained shall be construed to give to the said Sek Hean Whei or any successor of his power to sell, mortgage, charge, demise, let or otherwise alienate or part with the possession of the said land hereinbefore conveyed or any part thereof."

The donor reserved a power to re-enter if the priest failed to erect the temple within five years from the date of the deed; but the temple was erected and no point arises from this reservation.

It is clear from the size of the area of land and from the condition I have set out that it was never contemplated that the temple itself should cover all the land comprised in the gift.

The temple—to judge from the plan which had been put in—is of substantial size, and occupies roughly a quarter of the 5A. 0R. 05P. remaining after the acquisition under the compulsory power of the balance of the 12 acres in the year 1933. The acquisition did not interfere with the temple itself.

The plaintiffs are the administrators of the estate of the said Low Kim Pong, now deceased; and they allege that the land given for fruit trees was not a charitable gift, that it was a gift beneficially to the trustees for the time being, that it was a gift in perpetuity and, not being charitable, was void. Consequently they claim the $25,000 odd as part of the estate of Low Kim Pong.

Alternatively the plaintiffs say that the acquisition has caused a failure of the donor's intention and that it would be impossible to frame a cypres scheme to carry out this intention.

There is no question that a gift to a temple is, in this Colony, a good charitable gift. *Attorney-General* v. *Thupooree Soonderee*, 1 Kyshe 377, but Mr. Aditan's argument is that only portion of this gift was for the temple and that the rest was for the benefit of the trustees; he referred to 28 *Halsbury*, 1st ed. para. 57.

Now as I read this deed the priest was appointed sole trustee and manager. That is part of the first condition. The second condition gave the priest power by deed or will to appoint a suitable person, being a Buddhist priest, qualified to conduct and control the worship of the said god and goddess to be his successor as trustee and manager, and the successor in turn was to appoint a duly qualified successor, and so on, and should a trustee die without appointing his successor, it was to be lawful for Low Kim Pong or his eldest male descendant in the male line to appoint a duly qualified successor in place of the trustee so dying as aforesaid. Upon every such appointment the trust property shall, if necessary, be conveyed so as to vest in the trustee for the time being.

I quote from this condition at length because it clearly indicates that the donor intended that there should be only one trustee at a time, and that that trustee should be a Buddhist priest qualified to conduct the worship of the god and goddess.

Where in condition 3 the donor says that the proceeds are to be devoted to such purpose "as he or they may think fit" he means by "he" Sek Hean Whei the original priest and trustee, and by "they" the successive priests and trustees. The donor did not contemplate two or more concurrent trustees.

I think this is important in considering Mr. Aditan's argument; because it shews that it is the priest of the temple who is to devote the proceeds of the land to such purposes as he may think fit.

Counsel for the Attorney-General argued that the contemplated expenditure is to be incurred only for the purposes of the original gift and Mr. Zehnder for the trustees drew attention to the recital "dedicating a piece of land for the purpose of a temple" as indicating that "such purposes as he may think fit" must be restricted to temple purposes.

I would here pause to say that two persons are made defendants and the plaintiffs in their affidavit sworn in this originating summons state that the defendants are the trustees of the said indenture.

By an order made in originating summons No. 115 of 1932 on 8th July 1932 Sek Poh Leong also known as Poh Liang Soo, the head priest of the Song Lim See Temple (the present first defendant) was appointed trustee of the temple in the place of Sek Hean Whei deceased.

This appointment was entirely in accordance with the terms of the trust deed of 7th May 1900.

In an affidavit sworn by the present plaintiffs in Probate No. 190 of 1937 reference was made to the above order and to a deed of appointment of new trustees dated July 1935.

Possibly, the second trustee was appointed by this deed.

This point about the number of trustees *de facto or de jure* was not touched upon in argument before me. Suffice it to say that whether the second trustee was properly appointed or not I do not think that his appointment can defeat the trust.

Reverting now to the main argument the position as created by the donor Low Kim Pong was that land was intended to be given for the purpose of a temple and that the priest was to be trustee with power to dispose of the proceeds of the fruit trees as he thinks fit.

This eliminates the difficulty to which a like or joint power of disposition in the layman Cheok Huan Cheong may give rise. A layman can have no such power under the deed.

The only points to be considered, therefore, are whether "as he may think fit" is governed or qualified by "for the purpose of a temple" in the recital, and if it is not so qualified does it fail to be a charitable gift?

Now the operative part of the deed is clear so the recital does not control it. *Dawes* v. *Tredwell*, 18 Ch. D. 354.

But this does not dispose of the matter. The whole purpose of the deed as appears not merely from the recital but from the operative parts is for the establishment of the temple and, I think I may say, for its endowment.

I think the present a much stronger case than *In re Garrard*; *Gordon* v. *Craigie*, (1907) 1 Ch. 382 where a gift by will to a vicar and church wardens "to be applied by them in such manner as they shall in their sole discretion think fit" was held to be a good charitable gift for ecclesiastical purposes in the parish.

The purpose of the gift of land for growing fruit trees was to provide some endowment for the temple. "The 'endowment' of a church means that the income only of the fund is to be applied for the benefit of the incumbent; that is the main object of an endowment" *per* North J. in *In re Robinson*; *Wright* v. *Tugwell*, (1892) 1 Ch. 95.

My view that the gift is an endowment is based not only on the general tenour of the deed but on the strict provisions against alienation set out in the third condition. I do not think it makes any difference that the trustee and the beneficiary are one and the same person.

It may be that the purpose of the deed of 1935 in appointing the new trustees was to protect this very substantial sum of money, the corpus of which certainly does not belong to the priest for the time being of the Temple.

The money appears to be in the hands of the defendants. In my opinion the whole gift is a good charitable gift.

I answer the questions asked:

1. The temple is beneficially entitled to the corpus of the money in question. The priest for the time being is entitled beneficially to the interest earned by the money. He is undoubtedly free to spend the money if he sees fit on the maintenance of the temple structure.
2. The $25,433.32 is to be paid into Court.

The trustees have liberty to apply for the approval of a cypres scheme or for such other order for the better securing of the said sum as an endowment of the Temple as they think fit.

Order accordingly.

Solicitors for the plaintiffs—*Aditan & Co.*

Solicitors for first and second defendants—*Zehnder Brothers.*

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

October 29, 1937.

REX v. K. MUTHUVELU.

[SINGAPORE MAGISTRATE'S APPEAL No. 78 of 1937]

Telegraphs Ordinance (Cap. 72)—S. 38 sub-s. 1—Forfeiture of apparatus.

Section 38 sub-s. 1 of the Telegraphs Ordinance provides that the person guilty of the offences therein set out shall be liable to fine and imprisonment and also to forfeiture of apparatus.

Held, that the apparatus can only be forfeited if it belongs to the person committing the offence.

MAGISTRATE'S APPEAL.

Pillay for Appellant.

Storr, Crown Counsel, for the Crown.

Cur. Adv. Vult.

TERRELL, AG, C.J.—The accused was charged with working a wireless set without a licence, an offence punishable under section 38(1) of the Telegraphs Ordinance (Chapter 72). He was convicted and fined $50/- or two months' imprisonment and the set was ordered to be confiscated.

Although in some respects the evidence for the prosecution was not sufficiently detailed, I think on the whole that the witness Lillingstone proved that the set was capable of being worked, and there was material from which the learned District Judge could infer that the presumption which arises under section 37 (3) had not been displaced, and that accordingly the accused was proved to have committed the offence.

A difficulty however arises with regard to the forfeiture. Both the accused and the witness Fulkenstein gave evidence that the accused had not purchased the set, but merely had it on trial. Presumably therefore the set belonged to Fulkenstein. The learned District Judge makes no definite finding on this point, but contents himself with saying: "In any event (i.e. even if his evidence is true) Fulkenstein has broken the law." This is very likely to be the case. If however the set belonged to Fulkenstein then the forfeiture clause in section 38(1) hardly seems to be applicable. The section reads:—

> "Any person who.....works any apparatus.....without a licence shall be liable to a fine.....or to imprisonment.....and in either case shall be liable to forfeit any apparatus for wireless telegraphy installed or worked without a licence."

The forfeiture clause is quite different to that found in the Chandu Revenue, Petroleum Revenue and Liquors Revenue Ordinances in all of which the dutiable article in respect of which any offence has been committed may be seized at the discretion of a revenue officer and if seized, shall be forfeited. These Ordinances leave no discretion to the Court.

In the proposed bill to amend the Importation of Textiles (Quotas) Ordinance, it is to be provided in section 11(3): "any regulated textiles in respect of which reasonable suspicion exists that an offence under this Ordinance or any regulation made thereunder has been or is being committed.....may be seized and .....may be forfeited by order of the Court in which any person is convicted of any such offence."

It will be seen that in this proposed amendment as in the Telegraphs Ordinance the Court has a discretion, but in the former, as in the Chandu Revenue, Petroleum Revenue and Liquors Revenue Ordinances, the forfeiture can be directed or results from the commission of an offence in connection with the article forfeited, irrespective of the ownership of such article.

For some reason the forfeiture section in the Telegraphs Ordinance is drawn differently. Instead of providing that in case of any offence the apparatus shall be, or may be, forfeited, it provides that the person guilty of the offence shall be liable to forfeit the apparatus. I think that must mean that the apparatus can only be forfeited if it belongs to the person committing the offence.

Both the accused and Fulkenstein have sworn that the apparatus belonged to the latter, and there is nothing to contradict their evidence. In the result the wireless set can only be forfeited if Fulkenstein is found guilty of an offence, and the forfeiture in the present case must be set aside.

Apart from this the appeal will be dismissed and the sentence confirmed.

Appeal dismissed.

Solicitor for the appellant—*S. G. Pillay.*